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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DUANE WATERS, DEBRA TURNER and RUDY FAJARDO, on behalf of themselves, all others similarly situated and the general public,

Plaintiffs,

vs.

AT&T SERVICES, INC. (formerly SBC Services, Inc.) and DOES 1 through 10;

Defendants.

Case No: CV 09-3983 BZ

MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF CLASS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: February 9, 2011
Time: 1:30 p.m.
Courtroom G

TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 9, 2010 at 1:30 p.m., or as soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, Courtroom G, Plaintiffs Duane Waters, Debra Turner and Rudy Fajardo, on behalf of themselves,

the general public, and all others similarly situated ("Representative Plaintiffs") will and hereby do move this Court for an Order Granting Final Approval of Class Action Settlement.

This Motion is made pursuant to Federal Rule of Civil Procedure 23(e). The motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, Declarations and Exhibits filed herewith, the pleading and papers filed in this action, as well as any further documentation submitted to the Court and oral argument of counsel.

DATED: December 22 , 2010

SCHONBRUN DESIMONE SEPLOW
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Michael D. Seplow

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I. INTRODUCTION

Plaintiffs Duane Waters, Debra Turner and Rudy Fajardo, on behalf of themselves and all others similarly situated ("Representative Plaintiffs"), seek final approval of a class action settlement of wage and hour claims under California and federal law with Defendant AT&T Services, Inc. ("Defendant"). The settlement has received overwhelming support from members of the Class in that 84.4% of the 673 class members have submitted claims, which amount to 87.5% of the compensable workweeks. Indeed, there have been no objections to the settlement and only eight (8) class members have opted out of the settlement.

As a result of this settlement, which was reached after an arms' length negotiations, a full day mediation and a mediator's proposal, Defendant has agreed to a maximum payment of $17,000,000 to the Class (including payments to class representatives, class counsel, the claims administrator and the State of California Labor Workforce Development Agency), plus the employer's share of payroll taxes. The settlement will result in participating class members receiving payments of approximately $124 per compensable work week.

The Class is defined as:

> All persons who work or worked for AT&T Services, Inc. in the State of California as Senior Analysts (or Senior IT Analysts or Senior QC Test Analysts) or Senior Database Administrators while classified by AT&T Services, Inc. as exempt from overtime requirements at any time from August 27, 2005 through September 13, 2010 (the date of preliminary approval of the settlement).

There are 673 Class Members and the proposed settlement covers 94,540 compensable work weeks. As of the date of the filing of this motion, 84.4% of the class members have submitted claims forms, representing 87.5% of the eligible work weeks. The average payment to class members is approximately $18,085, with some class members receiving as much as $32,708.94.

This settlement is eminently fair and reasonable, and provides a tremendous benefit to the Defendant's employees and former employees who will be receiving payments of approximately $6,250 for each year of their employment within the class period. The settlement also benefits Defendant and the judicial system in that it obviates the need for multiple actions and for protracted litigation which could take years to resolve.

The proposed class action settlement concerns claims by Plaintiffs that they and the Class were misclassified as exempt from state and federal overtime law and not paid compensation for overtime hours they worked, including interest and penalties. Plaintiffs also allege Defendant failed to provide meal periods and failed to authorize and permit rest periods for the proposed class members. Defendant has denied Plaintiffs' allegations but has agreed to resolve these claims to avoid the costs and uncertainty of further litigation.

As discussed below, the proposed Settlement Agreement was reached after an in-depth investigation, extensive informal discovery, arms-length, non-collusive negotiations, and when negotiations appeared to reach an impasse, was the result of a mediator's proposal by a well-respected mediator. The Settlement Agreement satisfies all of the criteria for Court approval and falls well within the range of reasonableness. Defendant has agreed to join, and therefore does not oppose, Plaintiffs' Motion for Final Approval of this Class Action Settlement. Accordingly, the Court should approve the settlement because it is eminently fair and reasonable and will confer a substantial benefit upon the class.

II. PROCEDURAL HISTORY

Plaintiffs Duane Waters and Debra Turner, formerly employed as Senior Analysts (also known as Senior IT Analysts) with AT&T Services, filed this class action complaint on August 27, 2009 in the United States District Court for the Northern District of California alleging violations of both California law and the Fair Labor Standards Act ("FLSA"). On September 16, 2009, Plaintiffs filed a First Amended Complaint which added Rudy Fajardo, a former Sr. Database Administrator, as a named plaintiff. Defendant filed its Answer to the First Amended Complaint on October 28, 2009 in which it denied Plaintiffs' claims and asserted numerous

affirmative defenses.

After participating in the early meeting of counsel, the parties, with the Court's permission, agreed to stay formal discovery and participate in a private mediation. The parties participated in extensive informal discovery, which included surveys being sent to all class members, receipt and review of approximately 150 surveys, telephone interviews with dozens of class members, review and analysis of documents and data provided by Defendant, including analysis of the data and survey responses by Plaintiffs' expert forensic accountant.

On May 12, 2010, Counsel for all parties participated in an all day mediation at the San Francisco offices of well-respected class action mediator, Mark Rudy. At the conclusion of the mediation, the parties were at an impasse. Thereafter, Mr. Rudy proposed a mediator's compromise to resolve this case and gave each side one week to consider the proposal. On May 19, 2010, the mediator informed both sides that his proposal had been accepted. Declaration of Michael D. Seplow ("Seplow Decl."), ¶ 10. Thereafter, counsel for the parties worked on drafting an initial memorandum agreement and a more detailed proposed Settlement Agreement, subject to the Court's approval.[1/]

On July 15, 2010, the Plaintiffs filed an unopposed motion for Preliminary Approval of the Class Settlement. On August 4, 2010, the Court conducted an extensive hearing concerning the proposed settlement, which was attended by counsel for all parties. At the conclusion of the August 4, 2010 hearing, the Court ordered the parties to submit additional information and briefing concerning the fairness of the proposed settlement and ordered the parties to make certain changes to the proposed settlement agreement.

On August 23, 2010, the parties submitted the additional information requested by the Court, including declarations from counsel for both sides which included information concerning

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1. As part of the Settlement Agreement, Defendant provided to Plaintiffs' counsel a declaration under oath which stated the number of compensable work weeks covering the period from August 27, 2005 to May 19, 2010, provided an estimate as to the number of compensable workweeks through July 26, 2010 and explained the process by which the number of compensable work weeks was determined. Seplow Decl., ¶ 10. The figures set forth in that declaration are consistent with the final number of 94,540 compensable workweeks. *Id.* at ¶ 10.

the potential value of the claims, and a revised settlement agreement which addressed the Court's concerns. On September 13, 2009, the Court issued an Order for Preliminary Approval of Class Action Settlement, Conditional Class Certification, Approval of Class Notice and Setting of a Fairness Hearing, which approved of the settlement and the notice forms, subject to certain minor revisions [September 13, 2010 Order at 3:16-4:14]. The Court also approved the form and manner in which notice was to be sent to the class members, as well as the manner in which disputes concerning claims were to be resolve. The Court also approved the appointment of CPT Group as the Claims Administrator. Seplow Decl., ¶ 13.

On October 14, 2010, pursuant to the terms of the September 13, 2010 Order, the Claims Administrator mailed the notice of class settlement, along with the claim forms and exclusion forms, to 673 class members, whose names and addresses were provided by Defendant. Declaration of Julie Green ("Green Decl."), ¶ 2.[2/] On October 25, 2010, Plaintiffs filed a declaration from the Claims Administrator confirming that the class mailings were made on October 14, 2010 and that no issues had arisen with respect to the class mailings. Seplow Decl., ¶¶ 14-15.

The deadline to submit claim forms, exclusions forms and to object to the terms of the Settlement was December 13, 2010. The deadline to submit an opposition to the attorneys fees motion is January 12, 2011.

The hearing on the Motion for Final Approval and on Plaintiffs' Motion for Attorneys fees is set for February 9, 2011 at 1:30 p.m.

A total of valid claims have been received which represent over 84.4% of the class members and accounts for over 87.5% of the compensable work weeks. There have been no objections and eight (8) opt outs. Green Decl., ¶¶ 9, 15; Seplow Decl., ¶ 16.

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2. In addition to the mailings, pursuant to the settlement agreement, Defendant provided notice via company email to all of its current employee class members. Moreover, notice of the settlement, along with all of the pleadings and court orders in this action, have been posted on the web sites of Class Counsel. Seplow Decl., ¶ 14.

III. SUMMARY OF THE PROPOSED SETTLEMENT TERMS

The basic terms of the Settlement Agreement are as follows:

The Maximum Payment:

Under the Settlement Agreement, the Maximum Payment is Seventeen Million Dollars ($17,000,000) plus the employer's share of any applicable taxes. This includes payment of the claims of the Class Members, as well as enhancement award payments to the Class Representatives, attorneys' fees to Class Counsel, plus reasonable litigation costs, payment to the Claims Administrator to administer the Settlement, $35,000 to the State of California Labor Workforce and Development Agency ("LWDA"). Monetary disbursements to the Class is to be made on a claims made basis. The Class is entitled to the remainder of the Settlement, which is the Maximum Payout amount less the attorney fees award and costs, costs of claims administration, payment to the Labor Workforce Development Agency and the Enhancement Payment to the Named Class Representatives. However, only those who have made claims are entitled to receive compensation, with unclaimed funds reverting back to AT&T. The Class Members' Distribution Amount is calculated by: (1) dividing the Remainder of the Maximum Payment by the total number of compensable workweeks, revealing the value per compensable workweek; and (2) multiplying that amount by the number of compensable workweeks worked by each class member submitting timely and valid claims.

After calculating the amounts requested for attorneys fees, costs, claims administration, enhancement awards and payment to LWDA, the remainder to be distributed to the class is approximately $11,740,00, which represents payment of approximately $124 per compensable work week. Based on claims for 87.5% of the work weeks, $10,272,705, plus the employer's share of payroll taxes, will be paid to class members by Defendant.

Attorneys' Fees:

Plaintiffs request, and Defendant does not oppose, an award of attorneys' fees of thirty percent (30%) of the Maximum Payment (or $5,100,000) to Class Counsel for all of the work

already performed in this case and all work remaining to be performed.[3/]

Costs:

Plaintiffs request, and Defendant does not oppose, payment to Class Counsel of their reasonable litigation costs (approximately $30,000) from the Maximum Payment for costs and expenses incurred by Class Counsel in prosecuting the Action and in implementing the terms of this Settlement.

Enhancement to Class Representatives:

The Settlement provides for enhancement payments to each of the named Plaintiff Class Representatives Duane Waters, Debra Turner and Rudy Fajardo, in the amount of Twenty-Five Thousand dollars ($25,000). This compensation is in addition to whatever portion of the settlement proceeds the named Plaintiffs are otherwise entitled to receive. The enhancement is intended to compensate Plaintiffs fairly for the additional burdens and risks they undertook by agreeing to serve as Class Representatives, their assistance to counsel in the prosecution of the lawsuit and the excellent result achieved on behalf of the Class.

Payment to Labor Workforce and Development Agency

A sum of Thirty-Five Thousand Dollars ($35,000) from the Maximum Payment will be paid to the LWDA pursuant to the Labor Code Private Attorneys General Act ("the PAG Act"), Cal. Lab. Code § 2699 *et. seq.*, to cover any and all claims for penalties that were or could have been brought in this Action.

Administration of Claims:

The Court designated CPT Group ("Claims Administrator") to serve as Claims

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3. Plaintiffs are filing under separate cover, a motion for approval of an order awarding attorneys fees, costs and enhancement payments to the class representatives, along with declarations in support of their requests.

Administrator. On October 14, 2010, the Claims Administrator mailed out 673 notices to Class Members. Declaration of Julie Green ("Green Decl."), ¶ 3. The Notice advised the Class of the pertinent terms of the proposed settlement, namely, the claims to be resolved by way of the settlement, the maximum settlement amount, the proposed deductions for attorneys' fees, litigation costs, the class representative enhancements, the payment to the LWDA and estimated claims administration expenses. The Notice also provided each class member with the estimated amount of recovery they would receive from the Settlement. The Notice also advised Class Members of the basis upon which their pay rate would be calculated, the manner in which they could submit a claim to receive their share of the settlement, to request exclusion from the settlement or object to it, and the manner in which any disputes regarding claims were to be resolved. Green Decl., ¶ 3, Ex. A.

Of the 673 notices which were mailed (including 34 of which were re-mailed), seven (7) were returned as undeliverable. Green Decl., ¶ 6.

No objections to the settlement have been received and there have been were only eight (8) opt-outs, while 84.4% of Class Members submitted claim forms, representing 87.5% of the total workweeks available. Green Decl., ¶ 15; Seplow Decl. ¶ 16. The deadline to submit a claim form or exclusion form or object to the settlement was December 13, 2010. The Claims Administrator has estimated the highest claim to be $32,708.94, while the *average* claim is estimated at $18,085.75. Green Decl., ¶ 15.[4]

IV. FINAL APPROVAL SHOULD BE GRANTED BECAUSE THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.

Rule 23(e) of the Federal Rules of Civil Procedure 23(e) "requires the district court to determine whether a proposed [class action] settlement is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992), *cert. denied*, 506 U.S. 953).

4. The estimated Claims Administration expenses for which reimbursement is sought is $20,000. Green Decl., ¶ 16.

This determination requires a balancing of several factors which may include, among others, some or all of the following: the strength of Plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *Hanlon*, 150 F.3d at 1026; *see also Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *In re Mego Financial Corp. Securities Litigation,* 213 F.3d 454, 458 (9th Cir. 2000).

As the Ninth Circuit has noted:

> The district court's role in evaluating a proposed settlement must be tailored to fulfill the objectives outlined above. In other words, the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor [the Court of Appeals] is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators . . . .
>
> Ultimately, the district court's determination is nothing

> more than "an amalgam of delicate balancing, gross approximations and rough justice. [citation omitted] Finally, it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation. . . .

Officers for Justice v. Civil Serv. Comm'n of San Francisco, supra, 688 F.2d at 625.[5]

Furthermore, a proposed class action settlement is *presumed* fair under the following circumstances: (1) the parties reached settlement after arms' length negotiations; (2) investigation or discovery was sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Newberg on Class Actions* (4th ed. 2002) § 11.41 at pp. 92-93. The declarations of Class Counsel Michael D. Seplow, V. James DeSimone, and Thomas W. Falvey, filed concurrently herewith, as well as the August 23, 2010 declaration of defense counsel Thomas E. Geidt ("Geidt Decl."), demonstrate that the proposed settlement was the product of serious, informed and non-collusive negotiations, that sufficient investigation has been done to allow counsel and the Court to make an intelligent decision, and that Counsel has sufficient experience in this type of litigation.

Of critical importance is the fact that there are no objectors. With application of these factors, it is manifest that the proposed settlement provides a significant benefit to the class and is therefore fair, adequate and reasonable.

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5. *See also In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 179 (5th Cir. 1979) *cert. den sub. norm, Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n*, 452 U.S. 905 (1981). ("In determining whether to approve a proposed settlement, the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties."). Courts act within their discretion in approving settlements which are fair, not collusive and take into account "all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions." *Id.* at 179-80.

A. The Amount of the Settlement Is a Fair Compromise of Vigorously Contested, Factually Complex Claims, Subject to Many Legal Uncertainties.

As set forth herein, AT&T disputed liability on the merits of Plaintiffs' claims and also disputed whether class certification was appropriate in this case. There are significant legal uncertainties associated with misclassification, as well as rest and meal period claims. In cases such as this one, these claims can be factually complex and require protracted litigation to resolve.

AT&T has raised numerous defenses to liability and certification, meaning that Plaintiffs faced significant risks if the parties were to engage in protracted litigation. Indeed, Defendant denied and continues to deny any liability or wrongdoing of any kind and further contends that Defendant has complied with the California Labor Code, the California Business and Professions Code, the applicable Industrial Welfare Commission Wage Orders, and similar federal laws, including but not limited to the federal Fair Labor Standards Act. Defendant contends that case law supports its position that the employees at issue are exempt and also that the case would not be certified for a class action due to the predominance of individualized issues. Geidt Decl., ¶ 7.

Moreover, Defendant contends that the class members were properly designated as exempt. In particular, this case involved application of the administrative exemption, which is still a developing area of the law. For example, a U.S. District Court in California recently found that the administrative exemption applied to employees with arguably similar job duties as the Plaintiffs in this case. *See Heffelfinger v. Electronic Data Systems Corp.*, 580 F. Supp. 2d 933 (C.D. Cal. 2008). Defendant contends that the *Heffelfinger* case supports its position that the Class Members were exempt employees. *See* Geidt Decl., ¶ 15. Plaintiffs contend that *Heffelfinger* is readily distinguishable from this case and instead contend that this case is more analogous to *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120 (9th Cir. 2001) and *Eicher v. Advanced Business Integrators, Inc.*, 151 Cal.App.4th 1363 (2007), in which the employees were determined to be non-exempt. Nonetheless, the uncertainty in the law regarding whether the Class Members were non-exempt is a compelling reason why this settlement is fair and reasonable.

In addition to uncertainty regarding the Plaintiffs' contention that the Class Members are non-exempt, there is also a great deal of uncertainty regarding whether the case would ultimately certified as a class action under FRCP 23. Defendant took the position that the case was not appropriate for class certification because of the predominance of individualized issues. [6] Plaintiffs contend that this case was ripe for certification because each of the Class Members performed similar job duties as the Plaintiffs and there were company-wide policies that affected employees in a similar manner.[7] Again, given the substantial uncertainties that Plaintiffs faced regarding class certification, this settlement, in which class members will receive an average payment of approximately $18,000 per claimant within the next several months, is clearly fair and reasonable. Further, the parties have widely different estimates as to the amount of damages that could be recovered in the event that this case proceeded to trial.

In the face of these uncertainties, the parties agreed to a compromise settlement which provides for a claims-made settlement of up to $17,000,000 (plus the employer's share of payroll taxes) for the 673 Class Members. This is approximately 36% of the total overtime owed to the class based on the calculations made by Plaintiffs' expert (excluding penalties and interest). *See*

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6. Defendant contends that the duties of Class Members varied greatly, even for Class Members with the exact same job titles, and therefore class certification would be unlikely. Seplow Decl., ¶ 20. AT&T maintained that issues with respect to liability and certification required individualized analysis of the nature of the Class Members' work, job duties and responsibilities because AT&T's practices and procedures varied depending upon the department, location, supervisor, job, employee and day. *Id.*

7. Indeed, the case law regarding certification is also uncertain and leaves much to the discretion of the District Court. For example, Defendant was expected to rely upon the recent Ninth Circuit decisions of *In re Wells Fargo Home Mortgage Litigation*, 571 F.3d 953 (9th Cir. 2009) and *Vinole v Countrywide Home Loans*, Inc, 571 F.3d 935 (9th Cir. 2009) to support is claim that class certification is not appropriate. Plaintiffs contend that these cases are distinguishable and would instead rely on more recent decisions such as *Kamar v. Radio Shack Corp.*, 375 Fed.Appx. 734 (9th Cir. 2010) and *United Steel, Paper and Forestry, Rubber, Manufacturing Energy, Allied Industrial & Servce Workers International Unition, AFL-CIO, CLC v. Conocophillips Company*, 593 F.3d 802 (9th Cir. 2010) which support their position regarding class certification. Seplow Decl., ¶ 20.

Declaration of V. James DeSimone ("DeSimone Decl."), ¶ 5. [8/]

An analysis of the Maximum Payment to class members, which in this case is $11,740,000, shows that the dollar amount recovered on behalf of the class, at the time the agreement was reached on May 19, 2010, is approximately 25% of the total estimate of potential unpaid overtime, excluding penalties and interest. The settlement amount is, of course, a compromise figure, taking into account risks related to certification, liability, and damages. While counsel for Plaintiffs believe that Plaintiffs would prevail both on a contested Motion for Class Certification and in the liability and damages phase of this case, Plaintiffs' Counsel is also cognizant of the fact if the Motion for Class Certification were not granted, or if the Court or the jury determined that these putative class members were properly classified as exempt, that each class member would likely receive no recovery whatsoever. Moreover, Defendant strongly disputed the amount of overtime worked which, if believed by the trier of fact, would decrease the damage estimated by Plaintiffs. Counsel for Plaintiffs also recognize the recent trend towards denial of class certification in general.

For the 673 potential class members, this case involves 94,540 compensable work weeks. Under the proposed settlement, each class member will receive approximately $124 per work week. In this case, if the Motion for Final Approval is granted, each Class member will receive approximately $6,250 for every year worked in the eligible job positions. This means that class members who were employed in these positions for four years will receive approximately $25,000.00, providing for a certain and definite monetary payment as contrasted with the inherent uncertainty of litigation as well as the current uncertain economic climate. There is also a strong value in the prompt resolution of this case, which will ensure that class members will receive compensation by early 2011. Otherwise, they may have to wait for a potential recovery for several years, given the normal pace of litigation and the likelihood of an appeal of a substantial Plaintiffs' verdict. In light of all of these factors, Plaintiffs' counsel and their clients are of the firm belief that this settlement is in the best interest of the class.

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8. Defendant's assessment of its maximum exposure was considerably less than Plaintiffs' assessment. Geidt Decl., ¶ 8.

Moreover, a settlement is not judged based solely on what might have been recovered if the plaintiff had prevailed at trial; nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. *See Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("[T]he very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes ...The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.") [internal citations omitted]; *Officers for Justice*, 688 F.2d at 628 ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not ... render the settlement inadequate or unfair."); *Wershba v. Apple Computer Inc.*, 91 Cal. App. 4th 224, 251 (2001) ("Compromise is inherent and necessary in the settlement process ... even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated; this is no bar to a class settlement in which each side gives ground in the interest of avoiding litigation."); *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (N.D. Cal 2007) (noting the certainty of recovery in settlement of 6% of maximum potential recovery after reduction for attorneys' fees was higher than median percentage for recoveries in shareholder class action settlement, averaging 2.2%-3% from 2002-2006).[9/]

In light of the uncertainties of protracted litigation and the mixed legal precedent regarding the legal positions of the Parties, the Maximum Payout amount reflects an eminently fair and

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9. In fact, many settlements have been approved which represented a small fraction of the damages claimed. *See In re Crazy Eddie Securities Litigation*, 824 F.Supp. 320, 323-24 (E.D.N.Y. 1993) (approving settlement which represented 9.8% of potential damages or approximately 10 cents on the dollar (or 6 cents after fees and costs) for each class member); *Rebney v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1139 (1990), (approving settlement although monetary relief was "relatively paltry"); *Newman v. Stein*, 464 F.2d 689, 693, 699 (2d. Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972) (approving settlement of one seventh of potential recovery); *In re Rite Aid Corp. Securities Litigation*, 146 F.Supp.2d 706, 715-16 (E.D. Pa. 2001) (approving settlement of 9.65% of potential damages and noting that average settlement in class action securities case is approximately 5.85% of estimated damages).

reasonable recovery for the Class. *See* Declaration of Barrett S. Litt ("Litt Decl."), ¶¶ 16-20 (discussing the inherent risks in class action litigation). Given the fact that the Ninth Circuit has recognized a strong judicial policy in favor of settlements of class actions, (*Class Plaintiffs v. City of Seattle*, *supra*, 955 F.2d at 1276), the proposed settlement in which Class Members will receive a substantial monetary payment within the next several months is fair, reasonable and adequate and therefore should be approved.

B. The Extent of Investigation by the Parties Was, and Is, Sufficient to Allow Counsel, and this Court, to Support the Settlement.

Prior to reaching settlement in this case, Counsel for Plaintiffs engaged in extensive investigation and informal discovery. In particular, the parties engaged in significant and probative informal discovery. AT&T provided documents relevant in assessing potential liability, damages and impediments to class certification. Defendant produced data and documents regarding job titles, work weeks and termination dates and payroll data for each class member. AT&T provided data in the form of spreadsheets which indicated the number of workweeks employees worked, the annual salary for each Class Member and the number of Class Members who were no longer employed by AT&T. AT&T also provided detailed job descriptions for each of the job titles at issue in this case and provided the personnel records for the named Plaintiffs. DeSimone Decl., ¶ 3.

Moreover, Defendant provided the names and contact information for each Class Member to a third party administrator, which enabled surveys to be sent to each and every one of the then 667 putative class members (which included 606 Sr. Analysts and 61 Sr. Database Administrators). Class Counsel developed detailed questionnaires ("surveys") that were sent to the Class Members. Plaintiffs' counsel received survey responses from approximately 130 Sr. Analysts and approximately 30 surveys from Sr. Database Administrators, including extensive

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written comments by class members.[10/] Additionally, Plaintiffs' counsel called each class member who provided a survey response and conducted interviews with scores of class members. Based on these surveys and interviews, Plaintiffs' counsel compiled a detailed database of information concerning the job duties and work hours of the class members. *See* Seplow Decl., ¶ 23.

Class Counsel investigated further by reviewing and analyzing Defendant's documents, including job descriptions from the job titles at issue in this case. Class Counsel also analyzed extensive spreadsheets and other data provided by Defendant, including badge swipe data from each of Defendant's California facilities, security event logs from each of Defendant's California facilities, and extensive payroll and employee data as to each and every class member. Seplow Decl., ¶ 24. Moreover, prior to the filing of the motion for preliminary approval, Defendant provided Plaintiffs' counsel with a declaration under penalty of perjury indicating the manner in which Class Members were determined and attesting to the number of Class Members and work weeks involved in the case. Seplow Decl., ¶ 24.

Plaintiffs' Counsel retained the services of an expert forensic accountant, Philip Gorman, Ph.D, and worked closely with him to analyze the data provided by Defendant AT&T Services, as well as the information contained in approximately 160 survey responses from putative class members. The materials produced by Defendant included information and documents regarding job titles, claimed overtime hours, work weeks and termination dates and payroll data for each class member. The data provided to Dr. Gorman also included survey responses from approximately 130 Sr. Analysts and approximately 30 surveys from Sr. Database Administrators.

The total number of surveys – 160 – represents approximately 25% of the 673 class members. Based upon information received from Defendant, approximately 60% of those class

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10. At the time of the mediation, Plaintiffs' counsel had received approximately 160 surveys out of 667 putative class members. Since the mediation, the number of putative class members has increased to 673 and the total number of surveys received by Plaintiffs' counsel has risen to approximately 185. The information in these additional surveys is consistent with the information in the surveys received prior to the mediation. Seplow Decl., ¶ 23.

members are still employed by Defendant and 40% are former employees.[11] Further, according to information obtained from Defendant and from putative class members, AT&T re-classified the Sr. Database Administrator position as "non-exempt" in May 2009. The information obtained from Defendant and the surveys revealed that, apart from the re-classification of Sr. Database Administrators in May 2009, Defendant's practice during the class period with respect to the classification of Senior Analysts (including Sr. IT Analysts and Sr. OC Test Analysts) as being exempt from overtime requirements is consistent with the practice in effect during the named Plaintiffs' employment.

Dr. Gorman produced a detailed analysis of his findings which was relied upon extensively by Plaintiffs' counsel in preparation for the mediation utilizing primarily the payroll data supplied by Defendant and the overtime estimates provided by putative class members who responded to the surveys. Using data provided by Defendant, Dr. Gorman estimated the total number of workweeks to be 83,202 through April 30, 2010, and the classwide average hourly pay rate to be $36.43. According to Dr. Gorman's detailed analysis, based on the estimates of overtime worked, the total potential unpaid overtime without penalties and interest, was approximately $42,333,151 for Senior IT Analysts. The total for Senior Database Administrators was approximately $5,308,501 for a total of approximately $47,641,652 for the entire class. Thus, the $17,000,000 Class Action settlement provided, at the time the agreement was reached on May 19, 2010, for a recovery of approximately 36% of the total potential unpaid overtime, excluding penalties and interest.[12]

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11. Plaintiffs' counsel has received at least 67 surveys from current employees. Seplow Decl., ¶ 26.

12. These figures do not include potential penalties under California law for pay stub and waiting time violations. Plaintiffs estimate that total pay stub and waiting time penalties of the class to be in excess of $5,000,000. However, in order to establish these penalties, Plaintiffs would need to prove that Defendant acted "wilfully." Defendant contends that its wage statements and payments were made in good faith. Further, these figures do not include payments for missed meal and rest breaks under California law, which is an area of great uncertainty given the California Supreme Court's granting of review in *Brinkley v. Public Storage, Inc.*, 198 P.3d 1087 (2009) and *Brinker Restaurant Corp. v. Superior Court* ,196 P.3d

This figure is based on the assumption that the estimates of overtime hours contained in the survey responses which were reviewed by Dr. Gorman were both accurate and reflective of the class as a whole. Defendant AT&T Services, Inc. disputes these estimates, as stated in the Declaration of Thomas E. Geidt submitted to the Court on August 23, 2010, and contends that the potential recovery of damages, in this action is much less than that contended by Plaintiffs. *See* Geidt Decl., ¶ 7.

Therefore, at the time the Parties agreed to resolve the case, the Parties had throughly investigated and evaluated the factual strengths and weaknesses of this case and engaged in extensive investigation, research and informal discovery. This information was thoroughly analyzed by Class Counsel to assess the merits, class certification issues and damages. Seplow Decl., ¶ 27.

C. Plaintiffs' and Defendant's Counsel Are Experienced and Jointly Support the Settlement, and the Settlement Is the Product of Serious, Informed, Non-collusive Negotiations.

This is not a case of collusion by counsel for the Parties, but instead, a thoughtful, careful agreement to reach settlement of Class Members' alleged claims by experienced counsel, operating at arms' length, who have weighed the strengths of the case and examined all issues and risks of litigation and endorse the proposed settlement. The support of the attorneys actively conducting this litigation in favor of the settlement is entitled to significant weight in deciding whether to approve the settlement. *See Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) ("[T]he fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight.") , *aff'd* 661 F.2d 939 (9th Cir. 1980); *Fisher Bros. v. Cambridge Lee Industries, Inc.*, 630 F.Supp. 482, 488 (E.D. Pa. 1985) ("Although the court must independently evaluate the proposed settlement, the

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216 (2008). Plaintiffs estimate the amount of meal and rest break penalties to be in excess of $15,000,000 for the entire class, a figure which is vigorously disputed by Defendant. DeSimone Decl., ¶ 5.

professional judgment of counsel involved in the litigation is entitled to significant weight.").

Both Plaintiffs' and Defendant's counsel are particularly experienced in wage and hour employment law and class actions. *See* Seplow Decl., ¶¶ 4-5; DeSimone Decl., ¶¶ 22-26, 28; Falvey Decl., ¶¶ 5-9; Henderson Decl., ¶¶ 5-7. Class Counsel are very experienced in class actions and other types of complex litigation and have been successful in obtaining large dollar settlements on behalf of a class of persons. Seplow Decl., ¶ 5; DeSimone Decl., ¶ 28; Falvey Decl., ¶¶ 5-9. In light of this experience, Class Counsel are experienced and qualified to evaluate the Class claims and to evaluate settlement, versus trial, on a fully informed basis, and to evaluate the viability of the defenses. Similarly, Defense counsel are also highly experienced and support this settlement.

Class Counsel is convinced that this settlement is in the best interest of the class based on the negotiations and a detailed knowledge of the issues present in this action. DeSimone Decl., ¶ 32; Seplow Decl., ¶¶ 21, 28-30. The length and risks of trial and other normal perils of litigation that may have impacted the value of the claims were all weighed in reaching the proposed settlement. In addition, the affirmative defenses asserted by the Defendant, the prospect of a potential adverse summary judgment ruling, class certification issues, the difficulties of complex litigation, the lengthy process of establishing specific damages and various delays and appeals, were also carefully considered by Class Counsel in agreeing to the proposed settlement. Specifically, Class Counsel balanced the terms of the proposed settlement against the probable outcome of liability and the range of recovery at trial. Seplow Decl., ¶ 29.

Counsel on both sides share the view that this is a fair and reasonable settlement taking into consideration the complexities of the case, the state of the law and the uncertainties of class certification and litigation, and the excellent result for the Class. DeSimone Decl., ¶ 32; Geidt Decl., ¶ 11 . Given the risks inherent in this litigation and the defenses asserted, this settlement is fair, adequate, reasonable and in the best interests of the class and one which supports a grant of final approval.

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D. The Reaction of Class Members to this Settlement Has Been Overwhelmingly Positive.

The reaction of Class Members to this settlement has been overwhelmingly positive. More than 84% of Class Members have submitted claim forms -- which is an exceptional participation rate. There have only been 8 opt-outs, which is just over 1 % of all Class Members, while there have been no objections have been received. The widespread support of Class Members for this settlement is an additional and compelling reason why it should be approved. [13/]

V. THE CLASS NOTICE WAS PROPER.

"The contents of a Rule 23 (e) notice are sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing." *Newberg on Class Actions* (4th ed. 2002) § 8.32, *citing Miller v. Republic Nat. Life Ins. Co.*, 559 F.2d 426 (5th Cir. 1997) and *In re Four Seasons Securities Laws Litigation*, 525 F.2d 500, 503 (10th Cir. 1975).

In this case, the Court, after sufficient scrutiny approved the form and manner of the Notice to the Class Members, subject to certain minor revisions which were implement prior to the mailing.[14/] Here, the Notice informs Class Members about (1) the nature of the litigation; (2)

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13. Pursuant to the terms of the Settlement, the Claims Administrator received approximately six (6) timely disputes. Class Counsel are working to informally resolve any such disputes and, at this time, there appear to be four disputes which have not been resolved. In the event that any of these disputes cannot be resolved informally, the parties will submit them to the Court for resolution consistent with the terms of Settlement. Seplow Decl. ¶ 41. Similarly, there have been two late claims that were received within one week of the deadline, which the parties are attempting to resolve informally. Seplow Decl. ¶ 41.

14. In particular, in addition to notice being sent via first class mail to all Class Members, Class Members who were current employees of the Defendant were also sent an email by AT&T advising them of the settlement and providing them with the contact information for the Claims Administrator. Moreover, information about the Settlement, including copies of all pleadings, court orders and relevant documents, is available on the website of both Class Counsel law firms. Finally, on November 29, 2010, the Claims Administrator mailed reminder post cards

the terms of the settlement, including how their share of the settlement proceeds will be calculated and the estimated amount of each Class Member's share; (3) the fact that Class Members must submit a claim to participate in the settlement; (4) that Class Members have a right to exclude themselves from the settlement or object to it; (5) the date of the final approval hearing and the right of any Class Member to appear at the hearing; and (6) where Class Members can obtain more detailed information about the lawsuit. Green Decl. ¶ 3, Ex. A. Accordingly, the Notice clearly satisfies Fed. R. Civ. Proc. R 23(e) and constitutional due process.

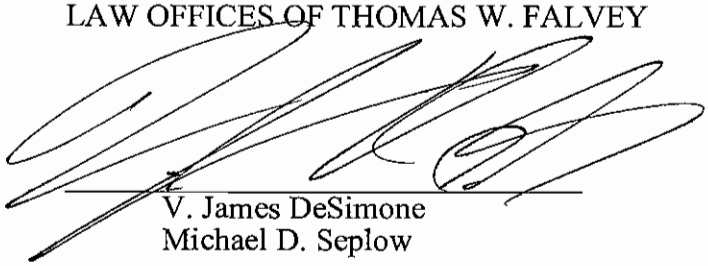
VI. CONCLUSION

The Parties have reached an agreement that disposes of the risks, costs and delay associated with further litigation, while allowing payments to Class Members on a fair and equitable basis. Defendant denies liability, but seeks, through this settlement, to obtain closure to this litigation. The settlement is reasonable, fair, and adequate and should be given final approval.

DATED: December 22, 2010

SCHONBRUN DESIMONE SEPLOW HARRIS HOFFMAN & HARRISON LLP

LAW OFFICES OF THOMAS W. FALVEY



V. James DeSimone
Michael D. Seplow

Attorneys for Plaintiffs

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to all class members whose claims had not been received. Green Decl., ¶ 7. Further, on December 1, 2010, the Claims Administrator made follow up phone calls to all class members whose claims had not been received. Green Decl., ¶ 8.